Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Customs and Patent Appeals and the United States Court of International Trade

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This issue contains

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 81–33)

Bonds

Approval and discontinuance of carriers bonds, Customs form 3587

Bonds of carriers for the transportation of bonded merchandise have been approved or discontinued as shown below. The symbol "D" indicates that the bond previously outstanding has been discontinued on the month, day, and year represented by the figures which follow. "PB" refers to a previous bond, dated as represented by figures in parentheses immediately following, which has been discontinued. If the previous bond was in the name of a different company or if the surety was different, the information is shown in a footnote at the end of the list.

Dated: February 12, 1981.

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
AAA Transfer, Inc., 615 So. 96th St., Seattle, WA; motor carrier; Safeco Ins. Co. of America. (PB 1/1/80) D 12/31/80 [1]	Dec. 29, 1980	Dec. 31, 1980	Seattle, WA $25,000
Ace Air Cargo Express, Inc., d.b.a.: Ace Cargo Service, 6410 Eastland Rd., Suite F, Brookpark, OH; Air Carrier; St. Paul Fire & Marine Ins. Co.	Jan. 14, 1981	Jan. 19, 1981	Cleveland, OH $50,000
B & B Trucking, Inc., 83 Egleston Rd., Westfield, MA; motor carrier; Hartford Accident & Indemnity Co. (PB 5/26/77) D 1/19/81 [2]	Dec. 8, 1980	Jan. 19, 1981	Boston, MA $25,000
Bels Product Co., Inc., P.O. Box 348, Montrose, MI; motor carrier; St. Paul Fire & Marine Ins. Co.	Dec. 26, 1980	Jan. 15, 1981	Laredo, TX $25,000
Border Truck Brokerage, Inc., 25 Lakeview Terrace, St. Albans, VT; motor carrier; St. Paul Fire & Marine Ins. Co.	Nov. 7, 1980	Jan. 12, 1981	Philadelphia, PA $25,000
Danis Transportation Co., Inc., 15 Hamlet Ave., Pawtucket, RI; motor carrier; Peerless Ins. Co.	Aug. 25, 1980	Jan. 12, 1981	Providence, RI $25,000

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Denver-Midwest Motor Freight, Inc. (A Co. Corp.) P.O. Box 996, Denver, CO; motor carrier; St. Paul Fire & Marine Ins. Co. D 1/20/81	Jan. 3, 1980	Mar. 3, 1980	El Paso, TX $25,000
Direct Winters Transport Ltd., #2 Tippett Rd., Downsview, Ontario, Canada; M3H 5X3; motor carrier; Reliance Ins. Co.	Nov. 13, 1980	Jan. 15, 1981	Detroit, MI $50,000
Frank P. Dow Co., Inc., Olympic National Bldg., Seattle, WA; motor carrier; Massachusetts Bay Ins. Co. D 8/11/80	Aug. 8, 1979	Sept. 14, 1979	Los Angeles, CA $50,000
Dunbar Transfer & Storage Co., Inc., 1726 Evelyn, Memphis, TN; motor carrier; Liberty Mutual Ins. Co.	Oct. 24, 1979	Dec. 12, 1979	New Orleans, LA $25,000
Eagle Express Co., 519 E. Second St. S. Boston, MA; motor carrier; Peerless Ins. Co.	Aug. 9, 1979	Jan. 26, 1981	Boston, MA $25,000
Hicklin Motor Lines, Inc., P.O. Box 377, St. Matthews, SC; motor carrier; Reliance Ins. Co. D 1/26/81	Jan. 7, 1974	Jan. 22, 1974	Charleston, SC $25,000
Hucks Piggyback Service, Inc., 1200 N. Tryon St., Charlotte, NC; motor carrier; Ins. Co. of North America	Dec. 9, 1980	Jan. 19, 1981	Wilmington, NC $25,000
Kartran Inc., 3310 Bobbie Lane, Graland, TX; motor carrier; St. Paul Fire & Marine Ins. Co.	Jan. 7, 1981	Jan. 7, 1981	Dallas/Fort Worth, TX $25,000
M & J Trucking Co., 20 Atlantic St., Bridgeport, CT; motor carrier; Aetna Casualty & Surety Co.	Dec. 12, 1980	Dec. 12, 1980	Bridgeport, CT $25,000
N.Y. N.J. Conn. Freight & Messenger Corp., 351 W. 38th St., N.Y., NY; motor carrier; Federal Ins. Co.	Nov. 27, 1980	Dec. 29, 1980	New York Seaport $50,000
Pozzi Brothers Transportation, Inc., 705 W. Meeker, Kent, WA; motor carrier; Aetna Ins. Co. (PB 3/31/71) D 12/11/80 [3]	Nov. 24, 1980	Dec. 11, 1980	Seattle, WA $25,000
Sewell Motor Express, Inc., 149 So. Mulberry St., Wilmington, OH; motor carrier; The Cincinnati Ins. Co.	Dec. 4, 1980	Jan. 7, 1981	Cleveland, OH $50,000
Sheans Freight Lines, Inc., 75 Locust St., Medford, MA; motor carrier; St. Paul Fire & Marine Ins. Co.	Aug. 6, 1979	Jan. 12, 1981	Boston, MA $25,000
Smith Transportation Co., 731 S. Lincoln, Santa Maria, CA; motor carrier; Hartford Accident & Indemnity Co.	Sept. 18, 1980	Jan. 12, 1981	Los Angeles, CA $50,000
Speedy Storage & Cartage (1975) Ltd., 2345 2nd Ave., A North, Lethbridge, Alberta, Canada; motor carrier; Seaboard Surety Co.	Dec. 16, 1980	Dec. 29, 1980	Great Falls, MT $25,000
Thames Valley Brick & Building Products, Ltd., 602 Grand Ave. E., P.O. Box 314, Chatham, Ontario, Canada; motor carrier; Transamerica Ins. Co. D 1/15/81	July 30, 1976	Sept. 29, 1976	Detroit, MI $100,000

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
United Transfer, Inc., 6898 N.W. 25th St., P.O. Box 520505, Miami, FL; motor carrier; American Casualty Co. of Reading, PA	Sept. 12, 1980	Dec. 18, 1980	Miami, FL $25,000
Wheeler Airlines, P.O. Box 12034, Research Triangle Park, NC; Air carrier; Ins. Co. of North America.	Dec. 15, 1980	Jan. 19, 1981	Wilmington, NC $25,000

[1] Surety is Mid-Century Ins. Co.
[2] Surety is Peerless Ins. Co.
[3] Surety is United Pacific Ins. Co.

BON-3-03

MARILYN G. MORRISON,
Director,
Carriers, Drawback and Bonds Division.

(T.D. 81-34)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in T.D. 81-13 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:

February 2, 1981	$0.067092
February 3, 1981	.065692
February 4, 1981	.066357
February 5, 1981	.065876
February 6, 1981	.065811

Belgium franc:

February 2, 1981	$0.029394
February 3, 1981	.029189
February 4, 1981	.029472
February 5, 1981	.029044
February 6, 1981	.029163

Denmark krone:	
February 2, 1981	$0.153374
February 3, 1981	.151906
February 4, 1981	.154261
February 5, 1981	.151630
February 6, 1981	.152022
Finland markka:	
February 5, 1981	$0.246184
France franc:	
February 2, 1981	$0.204436
February 3, 1981	.203252
February 4, 1981	.205486
February 5, 1981	.202184
February 6, 1981	.203046
Germany deutsche mark:	
February 2, 1981	$0.471476
February 3, 1981	.468384
February 4, 1981	.473037
February 5, 1981	.465983
February 6, 1981	.467181
Ireland pound:	
February 2, 1981	$1.7630
February 3, 1981	1.7380
February 4, 1981	1.7640
February 5, 1981	1.7400
February 6, 1981	1.7430
Italy lira:	
February 2, 1981	$0.000995
February 3, 1981	.000988
February 4, 1981	.000995
February 5, 1981	.000981
February 6, 1981	.000986
Netherlands guilder:	
February 2, 1981	$0.434972
February 3, 1981	.431965
February 4, 1981	.435920
February 5, 1981	.420610
February 6, 1981	.430571
Portugal escudo:	
February 3, 1981	$0.017730
February 6, 1981	.017699
Spain peseta:	
February 6, 1981	$0.011772

Sri Lanka rupee:	
February 2–6, 1981	$0.055991
Switzerland franc:	
February 2, 1981	$0.520833
February 3, 1981	.516262
February 4, 1981	.521921
February 5, 1981	.514403
February 6, 1981	.514933

(LIQ–3–01 O:C:E)

Dated: February 6, 1981.

GWENN KLEIN KIRSCHNER,
Acting Chief,
Customs Information Exchange.

(T.D. 81–35)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

Rates of exchange based on rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York for the Brazil cruzeiro, People's Republic of China yuan, Hong Kong dollar, Iran rial, Philippines peso, Singapore dollar, Thailand baht (tical), and Venezuela bolivar

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to part 159, subpart C, Customs Regulations (19 CFR 159, subpart C).

Brazil cruzeiro:	
February 2–5, 1981	$0.0146
February 6, 1981	.0144
People's Republic of China yuan:	
February 2–3, 1981	$0.620810
February 4–6, 1981	.623908
Hong Kong dollar:	
February 2, 1981	$0.189358
February 3, 1981	.188413
February 4, 1981	.189538
February 5–6, 1981	.188857
Iran rial:	
February 2–6, 1981	Not available

Philippines peso:	
February 2–5, 1981	$0.1320
February 6, 1981	.1315
Singapore dollar:	
February 2–3, 1981	$0.480769
February 4, 1981	.483092
February 5, 1981	.482393
February 6, 1981	.481464
Thailand baht (tical):	
February 2–6, 1981	$0.0484
Venezuela bolivar:	
February 2–6, 1981	$0.2329

(LIQ–3–01 O:C:E)

Dated: February 6, 1981.

GWENN KLEIN KIRSCHNER,
Acting Chief,
Customs Information Exchange.

Appeal to United States Court of Customs and Patent Appeals

Appeal No. 81–5

CANADIAN TARPOLY CO. *v.* U.S. INTERNATIONAL TRADE COMMISSION

1. SEC. 337 TARIFF ACT OF 1930, AS AMENDED—ALL WRITS ACT—MANDAMUS

Mandamus is an extraordinary remedy, available only in extraordinary circumstances and when no meaningful alternatives are available. This court's power to issue a mandamus under the All Writs Act is limited to situations in which such action is necessary or appropriate in aid of its jurisdiction.

2. ID.

It is established that the extraordinary writs cannot be used as substitutes for appeals, even though hardships may result from delay and perhaps unnecessary trial; and whatever may be done without the writ may not be done with it.

3. SCOPE OF STATUTORY AUTHORITY OF ADMINISTRATIVE AGENCY

Administrative agencies have considerable latitude to shape their remedies within the scope of their statutory authority, having wide discretion in dealing with the problems entrusted to them, and in determining the choice of remedy deemed adequate to cope with unlawful practices. The relation of remedy to policy is peculiarly for the administrative agency and its special competence.

The attorneys in the above case are: For Canadian Tarpoly Co.: Fred S. Whisenhunt, Murray & Whisenhunt, P.O. Box 40574, Washington, D.C. 20016; for International Trade Commission: Christine Bliss.

(Decided: February 5, 1981)

Before MARKEY, Chief Judge, RICH, BALDWIN, MILLER, and NIES, Associate Judges.

MARKEY, Chief Judge.

Petitioner seeks a writ of mandamus against the International Trade Commission (ITC). We deny the petition.

BACKGROUND

The matter results from an ITC Investigation No. 337–TA–54, In the Matter of Certain Multicellular Plastic Film, conducted under

sections 337 and 337a of the Tariff Act of 1930, as amended (19 U.S.C. 1337 and 1337a). Sealed Air Corp. there alleged unfair methods of competition and unfair acts in the unlicensed importation into the United States of certain multicellular plastic film allegedly manufactured in a foreign country by the process covered in claims 1 and 2 of its U.S. Patent No. 3,416,984 (the '984 patent). Petitioner was not a respondent in that investigation.

Having completed its investigation on June 12, 1979, the ITC determined that: (1) Claims 1 and 2 of the '984 patent were not proven invalid; and (2) the unauthorized importation and sale of film made by an infringing process has the effect or tendency to destroy or substantially injure an industry, efficiently and economically operated in the United States.

Accordingly, on June 29, 1979, the ITC ordered that:

> 1. Multicellular plastic film manufactured abroad in accordance with the process disclosed by claims 1 and 2 of U.S. Letters Patent 3,416,984 is excluded from entry into the United States for the remaining term of said patent.
>
> * * * * * * *
>
> 3. That persons desiring to import multicellular plastic film into the United States may petition the (ITC) to institute such further proceedings as may be appropriate in order to determine whether the multicellular plastic film sought to be imported should be allowed entry into the United States;
>
> 4. That this order be published in the Federal Register and served upon each party of record in this investigation and upon * * * the Secretary of the Treasury.

As of June 29, 1979, the Secretary of the Treasury, acting through the Customs Service, has refused entry of multicellular plastic film into the United States pursuant to the ITC's exclusionary Order; 19 U.S.C. 1337(d).

Petitioner, a Canadian corporation, manufactures summer swimming pool covers by cutting and sewing multicellular plastic film. Petitioner asserts that the film it uses is manufactured in Canada by a process not covered by claims 1 and 2 of the '984 patent. When the ITC exclusionary order took effect, petitioner says U.S. dealers and distributors ceased to order its pool covers, causing irreparable harm.

Petitioner asserts that it became aware of the ITC order in the early part of September 1980, and that it contacted the ITC in the middle of that month to discuss an expedited proceeding under paragraph 3 of the order. The ITC proffered an expedited proceeding, to begin in the first week of October. However, believing that it would suffer irreparable harm during the ITC estimated 4½ months required for the proceeding, petitioner declined to participate in the proffered proceeding.

Instead, on November 7, 1980, petitioner filed a petition with the ITC, challenging the legality of the exclusionary order. On December 10, 1980, the ITC denied that petition, saying that the order was within the scope of its statutory authority and that the expedited proceeding provided for in paragraph 3 was the most appropriate way to decide whether the plastic film which petitioner wished to export to the United States was noninfringing. The ITC informed petitioner that "to obtain expedited relief it may file a petition with the (ITC) requesting the institution of a proceeding pursuant to paragraph 3 of the (Order)".

Between December 10–17, 1980, petitioner again contacted the ITC, asking whether its pool covers could enter the United States if petitioner manufactured film in the United States, shipped it to Canada for assembly of pool covers, then exported those pool covers into the United States. The ITC suggested that petitioner request an advisory opinion on that question.

Declining an expedited proceeding under paragraph 3 of the order, petitioner filed this petition for writ of mandamus on December 17, 1980.

Petitioner asserts that the ITC order in investigation No. 337–TA–54 "exceeds the statutory authority" of the ITC, illegally "extends the monopoly" of the '984 patent, "is unconstitutional because it results in a taking of petitioner's property without due process of law", and "is arbitrary and capricious and is a clear abuse of discretion."

Petitioner asks that we issue a writ of mandamus to the ITC, "directing that the said order be vacated forthwith, at least as it applies to the petitioner, and that the (ITC) forthwith order the appropriate Customs officials to immediately suspend its directives which exclude from entry into the United States the multicellular plastic film of the petitioner."[1]

OPINION

[1] Mandamus is an extraordinary remedy, available only in extraordinary circumstances and when no meaningful alternatives are available. *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976); *Landis Tool Division* v. *U.S. International Trade Commission*, 614 F. 2d 766, 205 USPQ 112 (CCPA 1980). This Court's power to

[1] Alternatively, petitioner requests:

(2) (T)hat an order be issued, directed to the (ITC), requiring (it):

(a) to show cause in this Court, at a time to be designated, why (it) should not vacate the order forthwith, at least as it applies to the petitioner, and to show cause why (it) should not order the appropriate Customs officials to suspend its directives which exclude from entry into the United States the multicellular plastic film of the petitioner; and

(b) to immediately suspend the order, and notify the appropriate Customs officials of such suspension, for such time as is necessary to enable this Court to hear and determine this petition, in order to avoid additional harm to the petitioner.

(3) That the petitioner have such additional relief and process as may be deemed necessary and appropriate by this honorable Court.

The alternative requests are denied for the reasons set forth with respect to the request for writ of mandamus.

issue a mandamus under the All Writs Act (28 U.S.C. 1651(a)) is limited to situations in which such action is necessary or appropriate in aid of its jurisdiction. *Margolis* v. *Banner*, 599 F. 2d 435, 440, 202 USPQ 365, 370 (CCPA 1979).

There are meaningful alternative legal remedies available here. For example, petitioner could have participated, and may still participate, in the expedited proceeding proffered by the ITC pursuant to paragraph 3 of its order. If adversely affected by a final determination in that proceeding, petitioner could appeal to this court; 19 U.S.C. 1337(c). Thus, mandamus is not necessary in aid of this Court's jurisdiction.[2]

Petitioner would have us misuse the writ to circumvent normal appeal procedures and permit a collateral attack upon the legality of the ITC's exclusionary order. The order having issued more than 60 days before any action was taken by petitioner, a direct appeal of that order is not open to it. Efforts to obtain a court interpretation of the order by way of the present petition confuse the nature and purpose of mandamus with the nature and purpose of an appeal.

Petitioner urges that the writ of mandamus is appropriate to prevent irreparable harm, that is, loss of sales during the time required to complete an expedited paragraph 3 proceeding and a possible appeal to this court. The argument is devoid of merit. As stated by the Supreme Court in *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 383 (1953):

> **[2]** (I)t is established that the extraordinary writs cannot be used as substitutes for appeals, *Ex parte Fahey*, 332 U.S. 258, 259–260 (1947), even though hardship may result from delay and perhaps unnecessary trial, *United States Alkali Export Assn.* v. *United States*, 325 U.S. 196, 202–203 (1945); *Roche* v. *Evaporated Milk Assn.* [319 U.S. 21, 31 (1943)]; and whatever may be done without the writ may not be done with it. *Ex parte Rowland*, 104 U.S. 604, 617 (1882).[3]

The ITC has authority to exclude goods from entry into the United States. Upon determining that a particular act of unfair competition in importation causes an injury to domestic industry, it has authority to devise a remedy; 19 U.S.C. 1337. In the light of its determination in investigation No. 337–TA–54, and because the matter involved a patented process, there were at least two remedies available to the

[2] If petitioner attempts to export its pool covers into the United States, and the Customs Service bar entry, petitioner could file a protest. If its protest were denied, it could file a civil action in the U.S. Court of International Trade, which has exclusive jurisdiction over civil actions involving the exclusion of merchandise; 28 U.S.C. 1582(a)(4). In that court action, petitioner could put into issue the legality of the ITC exclusionary order and could raise the issue it raises here, with appeal, if necessary, to this court; 28 U.S.C. 1541. See W. Herrington, International Trade Commission Patent Practice at R-1-32 (Patent Resources Group, Inc. 1979).

[3] Had petitioner requested institution of a par. 3 proceeding when that proceeding was proffered, it may well have had a decision on the merits by this time.

ITC: (1) It could exclude multicellular plastic film from importation until the foreign manufacturer's process is shown not to be an infringement; (2) it could permit importation until Sealed Air Corp. proved that the foreign manufacturer's process does infringe.[4]

Remedy (1) would risk unfairness and injury to a foreign manufacturer whose process does not infringe by denying importation during the period necessary to establish non-infringement. Remedy (2) would risk continued unfairness and injury to the domestic industry, at the hands of a foreign manufacturer whose process did infringe, during the period necessary to prove infringement.

[3] Administrative agencies have considerable latitude to shape their remedies within the scope of their statutory authority, *SEC* v. *Chenery Corp.*, 332 U.S. 194, 207–209 (1947), having wide discretion in dealing with the problems entrusted to them, *FTC* v. *Cement Institute*, 333 U.S. 683, 726 (1948), and in determining the choice of remedy deemed adequate to cope with unlawful practices, *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 611–613 (1946), *FTC* v. *Mandel Bros., Inc.*, 359 U.S. 385, 392 (1959). The relation of remedy to policy is peculiarly for the administrative agency and its special competence, *General Protective Committee* v. *SEC*, 346 U.S. 521, 534 (1954). Moreover, as pointed out by the Supreme Court in *Buttfield* v. *Stranahan*, 192 U.S. 470, 493, 496 (1904):

> As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution.
>
> * * * * * * *
>
> * * * Congress legislated on the subject (free introduction of sugar, molasses, coffee, tea, and hides) as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.

See also *California Bankers Assn.* v. *Schultz*, 416 U.S. 21, 59 (1974).

The ITC chose remedy (1). Whether this court would have devised the same remedy is irrelevant for the purpose of determining whether the court should issue a writ of mandamus.

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[4] The record does not reflect any effort by petitioner for further ITC proceedings or for entry under bond.

The petition is denied.[5]

NIES, J., with whom BALDWIN, J., joins, dissenting.

Following an investigation entitled "In the Matter of Certain Multicellular Plastic Film, Investigation No. 337–TA–54," the following order was entered:

> 1. Multicellular plastic film manufactured abroad in accordance with the process disclosed by claims 1 and 2 of U.S. Letters Patent 3,416,984 is excluded from entry into the United States for the remaining term of said patent except (1) as provided in paragraph 2 of this order, infra, or (2) as such importation is licensed by the owner of U.S. Letters Patent 3,416,984;
>
> 2. * * * (A provision for entry under bond of subject articles during the period, now expired, when the order was subject to disapproval by the President.)
>
> 3. That persons desiring to import multicellular plastic film into the United States may petition the Commission to institute such further proceedings as may be appropriate in order to determine whether the multicellular plastic film sought to be imported should be allowed entry into the United States.
>
> * * * * * * *

The above paragraph 3 has been implemented as follows:

> (P)ersons * * * desiring to import multicellular plastic film may petition the Commission to institute further proceedings for the purpose of determining whether the film sought to be imported should be allowed entry into the United States. With respect to film produced by foreign manufacturers who were not respondents in the Commission's investigation, paragraph 3 is intended to insure that only such film found upon further investigation not to have been manufactured by a process infringing claims 1 and 2 of the '984 will be allowed entry. The effect of paragraph 3 is to place the burden of establishing noninfringement upon would-be importers rather than to require complainant, the aggrieved party in this matter, to prove infringement. (See USITC Publication 987, June 1979, pp. 22–23.)

Petitioner was not named as a respondent in the above proceeding and the process it employs to manufacture plastic film has not been the subject of an ITC investigation. Relief from this order is sought on the grounds that the ITC has acted beyond its jurisdiction and authority by ordering, even temporarily, the exclusion of the products of petitioner.

I agree with petitioner that a writ of mandamus or prohibition is a proper vehicle to bring this matter before this court. Further, I find the ITC has no authority to exclude articles prior to a determina-

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[5] Petitioner's "Motion for Waiver of Rules and Expedited Hearing or Decision", the ITC's "Motion to Dismiss Requests for Stay and for Expedited Proceeding", the "Motion of Sealed Air Corporation to Intervene as Party Respondent", Sealed Air's "Motion to Dismiss", the "Motion of Sealed Air for Setting of a Procedure to Respond", and the ITC's "Motion to Dismiss Petition for Writs of Mandamus and Prohibition" are rendered moot in view of our denial of the petition.

tion that unfair methods of competition and unfair acts in their importation exist except in accordance with 1337(e). Under 1337(d), paragraph 1 of the order must be limited to "the articles concerned" in investigation No. 337–TA–54. Paragraph 3 should be eliminated.

JURISDICTION OF THIS COURT

The threshold question is whether this court can issue a writ of mandamus or prohibition under the All Writs Act, 28 U.S.C. 1651(a), under the circumstances of this case. The All Writs Act states:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

We have previously held that the question of whether an order is within the statutory authority of the ITC is within the appellate jurisdiction of this court. *Import Motors, Ltd.* v. *U.S. International Trade Commission*, 63 CCPA 57, 530 F. 2d 940, 188 USPQ 491 (1976). Moreover, except for the jurisdiction of the Supreme Court, this appellate jurisdiction is exclusive. *World-Wide Volkswagen Corp.* v. *U.S. International Trade Commission*, 414 F. Supp. 713, 191 USPQ 626 (1976).

AVAILABILITY OF REVIEW BY WRIT OF MANDAMUS OR PROHIBITION

The second question which must be answered is whether petitioner has raised the type of question which is appropriately a subject for mandamus action, precedent requiring that a writ of mandamus is to be employed only under extraordinary circumstances. See *Swindell-Dressler Corp.* v. *Dumbauld*, 308 F. 2d 267 (CA 3 1962); *In re Josephson*, 218 F. 2d 174 (CA 1 1954). Circumstances justifying the use of a writ are present when a trial court or a Federal agency subject to an appellate court's review has exceeded its authority or has acted without jurisdiction, or has failed to exercise jurisdiction in a proper case. See *Ex parte United States*, 242 U.S. 27 (1916); *Webster Eisenlohr* v. *Kalodner*, 145 F. 2d 316 (CA 3 1944), cert denied, 325 U.S. 867 (1945); *Swindell-Dressler Corp.* v. *Dumbauld*, *supra* at 271–72.

A writ should not be used to circumvent normal appeal procedures but may be used in aid of appellate jurisdiction or for the purpose of reviewing conduct that is not otherwise reviewable by appeal.[1] In this case the time for appeal of the order of August 25, 1979, has expired. Further, under the procedure which the ITC has devised under paragraph 3 of its order, the basic order is not subject to attack. The issue

[1] See *United States* v. *Weinstein*, 452 F. 2d 704, 711–13 (1971), where Judge Friendly holds that a writ of mandamus is not necessarily limited to cases where an existing or potential appeal would be frustrated.

in the paragraph 3 proceeding is limited to infringement or noninfringement.[2]

The ITC, in opposing the writ of mandamus, argues that the procedure available to petitioner under paragraph 3 is fair inasmuch as it provides petitioner with an opportunity for an expedited (i.e., less than 12 months) procedure[3] for determining whether its process would infringe the subject patent if practiced in the United States. It assumes that it may properly limit petitioner to this issue and may properly shift the burden of proof. It argues further that the exclusion may only be temporary and, thus, does not cause undue hardship.

A post-judgment proceeding to determine only the issue of infringement will not assist this court in its determination whether the ITC has exceeded its jurisdiction in issuance of the underlying order as to which the appeal period has expired. Accordingly, the grant of a writ of mandamus does not in this case thwart normal appeal procedures. Moreover, where the issue is of significant importance in the overall functioning of the tribunal below, not merely in the case at hand, *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957), is precedent for exercise of this discretionary power when the opportunity is presented.

Apart from the showing necessary to establish that petitioner has standing and is aggrieved by the ITC order, which I find has been adequately established here by affidavits,[4] no evidentiary material is needed to determine whether the ITC order is invalid on its face. Accordingly, the question is reached as to the validity of the order.

THE ITC EXCLUSION AUTHORITY

The ITC is an independent agency of the Government performing a mix of legislative, executive, and judicial functions. Like any other administrative agency or board, it is entirely the creature of statute. *Civil Aeronautics Board* v. *Delta Air Lines, Inc.*, 367 U.S. 316 (1961); *Soriano* v. *United States*, 494 F. 2d 681 (CA 9 1974). Any authority delegated or granted to an administrative agency is necessarily limited to the terms of the delegating statute. As Chief Justice Warren succinctly stated in *Civil Aeronautics Board, supra*, at 322, "(T)he determinative question is not what the Board thinks it should do, but what Congress has said it can do."

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[2] The ITC submission here includes a notice of investigation of another third party process which includes a specific statement that the determination shall be limited to the question of whether the process would infringe claims 1 or 2 of patent '984, if practiced in the United States. (For convenience, this is referred to as infringement.)

[3] In another case with a stipulated record, it is estimated that the expedited procedure will take 4½ months. No assurance was given to petitioner as to the time involved.

[4] Petitioner asserts that the selling periods for its products are seasonal and it will lose a full year's contract unless it is allowed to import at this time.

Section 1337(d) provides:

> If the Commission determines, as a result of an investigation under this section, that there is a violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States.

In investigation No. 337–TA–54 the ITC noticed for investigation unfair acts in the importation of articles manufactured by certain named companies. No determination has been made that any unfair methods of competition are involved in the importation of products of Canadian Tarpoly, nor have the acts of those determined to have violated the statute been shown to be attributable to petitioner.[5] Appropriate findings as to products of petitioner are a condition precedent to their exclusion under 1337(d).[6]

Further, 1337(c) specifically states that:

> Each determination under subsection (d) * * * of this section shall be made on the record after notice and opportunity for a hearing in conformity with the provisions of subchapter 2 of chapter 5 of title 5. All legal and equitable defenses may be presented in all cases.

The ITC is apparently under the misconception that the finding in the investigation leading to the issuance of the exclusion order of August 25, 1979, that patent '984 is not invalid eliminates the necessity to reconsider that issue in the future. This is error. In denying petitioner the right to question validity, petitioner has been denied rights specifically afforded by the above quoted provisions of 1337(c). Petitioner is further judged to be in violation of the act until it proves compliance. The imposition of such a burden of proof may well determine the outcome of litigation, and in my view this burden has

---

[5] The determinations of violations were based on default by Unipak and Conform, over whom the ITC asserts in personam jurisdiction. Unipak has appealed this determination. Appeal No. 80–4.

[6] From the legislative history, it is beyond question that the words "the articles concerned, imported by any person * * *" were inserted to avoid the result here. See 62 Cong. Rec. 11241–244 (1922), which contains the following discussion:

> Mr. LENROOT. (Senator from Wisconsin, later Associate Judge, United States Court of Customs and Patent Appeals, 1929–1944.) * * * So, under the amendment now proposed, if one importer has indulged in unfair competition, and a finding to that effect is sustained and reported to the President, because one importer has been guilty of wrongdoing the President may fix rates from 10 to 50 percent ad valorem upon all merchandise, either of that character or any different character.
>
> Mr. REED. Let me ask the Senator whether, in the case he has just put, it would not be much wiser if we provided penalties to be visited upon the particular importer who violated the proper practices, and reach it in that way, instead of reaching it by excluding everybody?
>
> Mr. LENROOT. I think that is the way to reach it. The Senator from Utah has just called my attention to one of the amendments which is intended to be proposed, which will limit it to merchandise imported in violation of this act. Do I understand from the Senator from Utah, then, that it will not be a general rate imposed upon all merchandise but will be a rate imposed upon merchandise imported by a given individual who is guilty of violation of the act?
>
> Mr. SNOOT. That is all there is to it, Mr. President. The criticism the Senator has just offered to the original paragraph is absolutely correct. Under that, if there had been one violation the President could have imposed the extra duty upon all importations, by any and every person, of that kind of merchandise, and that is why the committee is going to offer this amendment.
>
> Mr. LENROOT. I am very frank to say that that very greatly improves the section.

At that time the President issued the order following an investigation by the Tariff Commission (predecessor of the ITC) and had the authority to order either additional duties or refusal of entry.

been improperly placed on petitioner who is being treated differently from the named respondents in the investigation which led to the order, without justification or explanation. This attempt to shift the burden is proscribed by the Administrative Procedures Act 5 U.S.C. 556(d) (APA) and the Commission's own rules.[7]

If the ITC or Sealed Air, the original complainant, wishes to effect a temporary exclusion of the products of Canadian Tarpoly while the infringement question is under consideration, it must do so in accordance with 1337(e). Under that section Congress has provided additional protection for a person in the position of petitioner. One whose products are affected by an exclusion order during the pendency of an investigation is entitled to entry of its goods under bond.

I find the creation of a proceeding of the nature described in paragraph 3 ultra vires of the authority of the ITC.

THE VIEW OF MAJORITY

The majority states that there are at least two meaningful legal remedies available to petitioner here without resort to mandamus. The first is the paragraph 3 procedure for determination of the sole issue of infringement, which I have previously discussed.

As a second, the majority suggests that petitioner secure an appealable judgment from the U.S. Court of International Trade by making a shipment of its pool covers to the United States, and, assuming the articles are refused entry, filing a protest with Customs and, assuming that is refused, instituting proceedings before the Court of International Trade (formerly the U.S. Customs Court), and then appealing to this court. I cannot agree with the majority that the availability of a collateral attack on an ITC order by this contrived action against acts of Customs cures the deprivation of a right of direct appeal to this court, given to petitioner under 19 U.S.C. 1337(c) and which the scope of the order has effectively precluded.[8]

Clearly, petitioner is adversely affected by a final order of the ITC which is devised to preclude one in the position of petitioner from raising substantive appealable issues and has been denied relief therefrom. The use of mandamus authority will do no more than preserve the full appellate jurisdiction of this court.

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[7] The complainant has the burden of proof of infringement under 19 CFR 210.42(a). Cf. *Exxon Corp.* v. *F.T.C.*, 411 F. Supp. 1362, 1379 (D.C. Del. 1976). The ITC has no published rules pertaining to a par. 3 type proceeding.

[8] 19 U.S.C. 1337(c) reads in part:

> Any person adversely affected by a final determination of the Commission under subsec. (d), (e), or (f) of this section may appeal such determination to the U.S. Court of Customs and Patent Appeals.

In *Import Motors, Ltd.* v. *U.S. International Trade Commission*, 63 CCPA 57, 530 F. 2d 940, 188 USPQ 491 (1976), this court indicated that appeal rights are not limited to parties below.

The majority treats the question here simplistically as one involving the exercise of discretion by the Commission in choosing between two legal remedies, one of which better protects the interests of U.S. industry and, thus, reasonably was chosen. It is not. The question is whether the chosen remedy is within the Commission's statutory authority. The majority divorces the Commission's authority to issue exclusionary orders from the express limitation in 1337(d) that a determination of violation must precede its direction that the articles concerned be excluded from entry. Appropriate findings as to the articles concerned in this petition have not been made and the articles, thus, cannot be excluded by an order under 19 U.S.C. 1337(d).

The majority's reliance on *Buttefield* v. *Stranahan*, 192 U.S. 470 (1904), is misplaced. The issue here is not whether the statute is a valid exercise of Congress' plenary power over foreign commerce and whether that power has been properly delegated to the ITC. The issue is whether the ITC has acted in accordance with its statutory mandate. I find that it has not.

Finally, the majority's interpretation of the statute is irreconcilable with the minimum standards set forth in the APA which has been specifically made applicable to ITC adjudications. The APA requires notice, hearing, and findings prior to imposition of a sanction. That the order or effect may be temporary or only an initial determination does not make it sustainable. Cf. *Ligon Specialized Hauler Inc.* v. *I.C.C.* 587 F. 2d 304, 315–20 (CA 6 1978).

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
Morgan Ford
Scovel Richardson
Frederick Landis
James L. Watson
Herbert N. Maletz
Bernard Newman
Nils A. Boe

Senior Judge

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 81–13)

HAARMAN & REIMER CORPORATION, PLAINTIFF *v.* THE UNITED STATES, MALCOLM BALDRIGE, SECRETARY OF COMMERCE; PAUL O'DAY, ACTING UNDER SECRETARY OF COMMERCE FOR INTERNATIONAL TRADE, DEPARTMENT OF COMMERCE; WILLIAM T. ARCHEY, ACTING COMMISSIONER OF CUSTOMS; AND, ALL DISTRICT DIRECTORS OF CUSTOMS, DEFENDANTS; CHINA NATIONAL NATIVE PRODUCE & ANIMAL BY-PRODUCTS IMPORT AND EXPORT CORPORATION, INTERVENOR

Court No. 81–1–00027

Memorandum Opinion and Order Denying Application for Preliminary Injunction

(Dated February 2, 1981)

BOE, Judge: From an examination of the record in the instant proceedings, it appears that on June 9, 1980, the plaintiff herein filed a petition with the U.S. Department of Commerce seeking the imposition of antidumping duties on menthol imported from the People's Republic of China, alleging that such merchandise is being or is likely to be sold in the United States at less than fair value. On November 25, 1980, the plaintiff, by way of amendment to its original petition, asserted the existence of critical circumstances with respect to the said imports of menthol within the purview of 19 U.S.C. 1671b(e)(1).

In its preliminary determination published in the Federal Register on January 14, 1981, the Department of Commerce held that: (a) There is a reasonable basis to believe or suspect that exports of natural menthol from the People's Republic of China are being, or are likely to be, sold in the United States at less than fair value within the meaning of 19 U.S.C. 1673; (b) critical circumstances as alleged in plaintiff's amended petition do not exist with respect to imports of menthol from the People's Republic of China and, accordingly, liquidations will not be suspended retroactively in accordance with the statute so made and provided.

In its complaint instituting the above-entitled action, the plaintiff seeks: (1) To enjoin the defendants from liquidating any entries or withdrawals from warehouse for consumption of menthol imported into the United States from the People's Republic of China, which remain unliquidated, on or after 90 days prior to the publication of the preliminary determination of the Department of Commerce, that is—October 16, 1980; (2) to determine that critical circumstances exist with respect to imports of menthol from the People's Republic of China within the meaning of 19 U.S.C. 1671b(e)(1) or in the alternative, to remand the proceedings to the Department of Commerce for further investigation and consideration.

In a prior order of this court under date of January 15, 1981, the application of the plaintiff for a temporary restraining order seeking to enjoin the liquidation of any and all unliquidated entries of menthol from the People's Republic of China entered, or withdrawn from warehouse for consumption, on or after October 16, 1980, was denied.

In the within proceeding duly and regularly brought on for hearing before this court pursuant to its prior order, the plaintiff seeks to restrain the defendants pendente lite from liquidation of the unliquidated entries of menthol from the People's Republic of China entered or withdrawn from warehouse for consumption, on or after October 16,

1980. In said proceeding the plaintiff appeared by and through its attorneys, Eugene L. Stewart and Terence P. Stewart, the defendants appeared by and through one of its attorneys, Velta Melnbrencis, and the intervenor, China National Native Produce and Animal By-Products Import and Export Corp. (CNEC), appeared by and through its attorneys, Donald L. Cuneo, Charles B. Manuel, Jr., and Nancy B. Turck of the law firm of Shearman & Sterling.

The court having heard the evidence adduced, the arguments of counsel and considered the memoranda submitted by respective counsel together with all the files, documents, and papers contained in the record herein, accordingly enters its decision and order with respect to plaintiff's application for a preliminary injunction together with its memorandum opinion in connection therewith.

In considering the requisite standards that are a prerequisite to preliminary injunctive relief, the court initially turns its attention to the plaintiff's likelihood of success in the trial of the within action on the merits.

Plaintiff contends that inasmuch as section 516A of the Tariff Act of 1930 as added by the Trade Agreements Act of 1979 (19 U.S.C. 1516a) does not provide in an antidumping proceeding for a judicial review of a negative preliminary determination by the administering authority with respect to critical circumstances, such a review necessarily is properly predicated under the residual jurisdictional grant provided in section 201 of the Customs Court Act of 1980 (28 U.S.C. 1581(i)). In sum, the plaintiff relies on a recognized legal principle that in the absence of a persuasive showing that the legislative authority did not intend judicial review of a final administrative determination, a review will be accorded under the general principles of administrative law and the Administrative Procedure Act.[1] *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967).

Assuming for the purpose of argument that the challenged critical circumstances determination is a final agency action within the meaning of *Abbott Laboratories*, the judicial inquiry made must be as follows:

> Whether in the context of the entire legislative scheme the existence of that circumscribed remedy evinces a congressional purpose to bar agency action within its purview from judicial review. 387 U.S. at 141.

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[1] It should be noted that the court does not conclude that the administrative determination in issue is a final agency action within the meaning of *Abbott Laboratories* and sec. 10(c) of the Administrative Procedure Act, 5 U.S.C. 704. In the statutory scheme of the Trade Agreements Act of 1979, the challenged critical circumstances determination is provided under 19 U.S.C. 1671b, which is denominated: Preliminary Determinations. A critical circumstances finding must be made as a part of the administering authority's final determination pursuant to 19 U.S.C. 1671d(a)(2). Sec. 1671d is denominated: Final Determinations. Congress' intent to make certain preliminary determinations reviewable only in connection with the final determination thereon is discussed on p. 6, infra.

For the reasons stated hereafter, this court finds that the entire legislative scheme, indeed, evinces a congressional intent to bar judicial review of the agency action in question.

The House Judiciary Committee Report, H. Rept. 96–1235 at 47, clearly indicates that section 1581(i), under which plaintiff predicates its present proceeding, is intended to be solely a residual grant of jurisdictional authority. It likewise clearly and expressly renounces any intention of creating a new cause of action thereby.

> *Subsection (i) intended only to confer subject matter jurisdiction upon the court, and not to create any new causes of action not founded on other provisions of law.* [Italic supplied.]

As further stated in the committee report, supra at 47:

> The purpose of this broad jurisdictional grant is to eliminate the confusion which currently exists as to the demarcation between the jurisdiction of the district courts and the Court of International Trade. This provision makes it clear that all suits of the type specified are properly commenced only in the Court of International Trade. The committee has included this provision in the legislation to eliminate much of the difficulty experienced by international trade litigants who in the past commenced suits in the district courts only to have those suits dismissed for want of subject matter jurisdiction. The grant of jurisdiction in subsection (i) will insure that these suits will be heard on their merits.

It is noteworthy that in the enactment of the Customs Court Act of 1980, the Congress was particularly attentive to its predecessor act, the Trade Agreements Act of 1979. The two legislative statutes, serving as companion measures, not only broadened the jurisdictional scope of this court, but also redefined the scope and extent of the judicial review of this court particularly with respect to the administration of the countervailing duty and antidumping laws provided by earlier legislation. Thus, in broadening the jurisdictional authority of this court the Congress clearly has been ever mindful of the definitive extent, nature and time of the judicial review which it has authorized in the Trade Agreements Act of 1979. Again, this fact has been emphasized in the House Committee Report to the Customs Court Act of 1980, supra at 48:

> As in the case of subsection (a) of proposed section 1581, it is the intent of the committee that the Court of International Trade not permit subsection (i), and in particular paragraph (4), to be utilized to circumvent the exclusive method of judicial review of those antidumping and countervailing duty determinations listed in section 516A of the Tariff Act of 1930 (19 U.S.C. 1516a), as provided in that section. Since subsection (i) merely confers jurisdiction on the court and does not create any new causes of action, H.R. 7540 does not change the rights of judicial review which exist under section 516A.

This court cannot conceive of any explanatory language on the part of a legislative authority with respect to its intent to be more explicit than the further words contained in the House Committee Report, supra at 48:

> *The committee intends that any determination specified in section 516A of the Tariff Act of 1930, or any preliminary administrative action which, in the course of proceeding, will be, directly or by implication, incorporated in or superceded by any such determination, is reviewable exclusively as provided in section 516A. For example, a preliminary affirmative antidumping or countervailing duty determination or a decision to exclude a particular exporter from an antidumping investigation would be reviewable, if at all, only in connection with the review of the final determination by the administering authority or the ITC.* [Italic supplied.]

Turning to the Trade Agreements Act of 1979, it appears clear that in adding section 735(a)(3) to the Tariff Act of 1930 (19 U.S.C. 1673d(a)(3)), the Congress has provided for the specific time when findings as to the existence of critical circumstances shall be made as well as the nature and content of such findings:

> (3) CRITICAL CIRCUMSTANCES DETERMINATIONS.—If the final determination of the administering authority is affirmative, *then that determination, in any investigation in which the presence of critical circumstances has been alleged under section 733(e), shall also contain a finding of whether—*
>
> (A)(i) there is a history of dumping in the United States or elsewhere of the class or kind of merchandise which is the subject of the investigation, or
>
> (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the merchandise which is the subject of the investigation at less than its fair value, and
>
> (B) there has been massive imports of the merchandise which is the subject of the investigation over a relatively short period. [Italic supplied.]

It is this final determination by the administering authority that Congress has specifically made judicially reviewable by this court. 19 U.S.C. 1516a(a)(2)(B). Contrary to the assertion of the plaintiff that the silence of the statute with respect to a judicial review of a negative preliminary determination by the administering authority as to critical circumstances mandates the initiation of such a review under 28 U.S.C. 1581(i), this court is of the opinion that the pattern of review as sculptured in 19 U.S.C. 1516a indicates the intent of the Congress to specifically define therein those determinations made by the administering authority which are to be subject to judicial review. Thus, it cannot be assumed that the absence of a provision providing for the specific judicial review of a negative preliminary determination as to critical circumstances is an unintentional omis-

sion. Rather it must be considered as a part of the overall pattern and design of congressional intent. In this connection it will be noted that section 1516a, in addition to not providing for review of negative preliminary determinations as to critical circumstances, likewise does not provide judicial review of any affirmative preliminary determination in an antidumping proceeding. Judicial review thereof is postponed until the time of the final determination. In short, in view of the definitive recognition which Congress has made with respect to the time and nature of the judicial review of preliminary determinations provided for in the Trade Agreements Act of 1979, this court is unable to accept the contention of the plaintiff that the absence of the right of judicial review of a negative preliminary determination as to critical circumstances legitimatizes the exercise of the provisions of the Administrative Procedure Act under the residual jurisdictional grant provided by section 1581(i). To hold otherwise would serve to foster and promote a patchwork of judicial review proceedings of administrative determinations in an antidumping investigation at timeframes which Congress clearly has indicated its intention to circumscribe.

It is the opinion of this court, therefore, that the plaintiff is unlikely to prevail in the trial of said action on the merits for the reason that said action has not been brought in conformity with the provisions of the Trade Agreements Act of 1979, which solely and exclusively provides for the time and manner of judicial review of the subject matter of the within proceeding.

This court is of the further opinion that in the instant proceedings, the plaintiff has failed to show to the satisfaction of the court its likelihood of success in the trial of this action on the merits with respect to the alleged error on the part of the administering authority in its negative preliminary determination as to the existence of critical circumstances.

Minimal credible evidence, if any, has been offered with respect to neither of the two alternative, but mandatory, findings requisite to an affirmative preliminary determination as to the existence of critical circumstances by the administering authority, namely: (1) a history of dumping in the United States or elsewhere relating to the class or kind of merchandise which is the subject of the investigation,[2] or (2) that the importer and/or the persons at whose account the merchandise was imported knew or should have known that the exporter was selling the merchandise which was the subject of the investigation at less than fair value.

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[2] As explained in the House report to the Trade Agreements Act of 1979, 79, H. Rept. 96-317 at 63, "History of dumping may be found to exist if the kind or class of merchandise under investigation was subject to a *dumping finding* either in the United States or another country." [Italic supplied.] No evidence as to any such previous *dumping finding* has been adduced in this proceeding.

The time during which the investigation in question was conducted by the administering authority was extended pursuant to statute by virtue of its extraordinarily complicated nature. Unknown to any of the parties to this proceeding, a country other than the exporting nation was selected from a group of five or six other countries exporting similar merchandise as a surrogate in the making of the preliminary determination by the administering authority. Although statistics offered by the plaintiff indicate an increase in the removal of the subject merchandise from warehouse for consumption in greater quantities during the last quarter of 1980, in view of the testimony of the witnesses produced by the intervenor at the within proceedings, this court is in no manner satisfied that the plaintiff has demonstrated that the administering authority erred in not finding that the importers knew or should have known that the exporter was selling the subject merchandise at less than fair value.

In view of the foregoing conclusion of this court with respect to plaintiff's likelihood of success in a trial of this action on the merits, a prolonged discussion relating to the alleged irreparable injury which might be sustained by the plaintiff as a result of the failure of this court to grant a preliminary injunction is deemed unnecessary.

An affidavit by a staff attorney in the Department of Commerce, appended to defendants' memorandum brief, indicates that substantial amounts of menthol entered or withdrawn from warehouse for consumption in the period October 16, 1980 to January 14, 1981, may remain unliquidated. Plaintiff's evidence with respect to the alleged irreparable injury suffered thereby, consists, however, primarily of an affidavit made by an employee of the plaintiff containing statements, inter aliâ, based on information and belief that most or all of the Chinese menthol imported in the relevant 90-day period has not been sold to end-users and that lost revenues and price suppression would result from the presence of such Chinese menthol in the marketplace.

The evaluation of the sufficiency of the evidence of the character offered by the plaintiff, referred to in Wright and Miller, "Federal Practice and Procedure: Civil," section 2949 is of particular pertinence:

> (W)hen the primary evidence introduced by plaintiff is an affidavit made on information and belief rather than on personal knowledge, it generally is considered insufficient to support a motion for a preliminary injunction.

The statement in plaintiff's affidavit, however, is expressly contradicted by the testimony of witnesses presented by the intervenor at the hearing. The witnesses, who are major importers in the United States of Chinese menthol, testified that their contracts for the purchase of menthol from the Chinese exporter are made with a leadtime of approximately 6 months to 2 years prior to actual delivery and

importation and that generally all menthol so contracted is presold to their respective customers prior to actual delivery of the merchandise to the United States. It further appears that the last contract for the purchase of menthol from the Chinese exporter was made by the witness, Boody, in July 1980; whereas the last contract for the purchase of menthol from the Chinese exporter was made by the witness, Barasch, in January 1980.

Suffice it to say, it does not appear to the satisfaction of this court that the plaintiff has sustained its burden of demonstrating that irreparable injury will result to it by reason of the failure of this court to grant its application for a preliminary injunction.

The Government has filed at the time of hearing on the within application of the plaintiff its memorandum in opposition to plaintiff's motion for a preliminary injunction as well as in support of a motion to dismiss the above-entitled action for failure to state a claim upon which relief could be granted, filed contemporaneously therewith.

This court views defendants' motion to dismiss as dispositive in nature directed to the entire cause of action of the plaintiff and to which the plaintiff is entitled to respond in the manner provided by the rules of court. Accordingly, no disposition is or will be made with respect to defendants' motion to dismiss in the instant proceedings, said proceedings having been confined solely to the consideration of those matters pertaining and requisite to plaintiff's application for a preliminary injunction.

In view of the foregoing and good cause appearing, it is hereby

ORDERED that plaintiff's motion for a preliminary injunction, pendente lite, be and is hereby denied.

(Slip Op. 81–14)

ZENITH RADIO CORPORATION, PLAINTIFF v. UNITED STATES, DEFENDANT

Court No. 80–5–00861

Order and Memorandum on Defendant's Motion to Dissolve or Modify Preliminary Injunction

(Dated February 2, 1981)

MALETZ, Judge:

1. Defendant's motion to dissolve or in the alternative to modify the preliminary injunction issued by the court on December 9, 1980, is hereby denied.

2. While jurisdiction of the court to entertain this action is undisputed, a few comments on this aspect are worthy of note. As

originally enacted, section 701(a) of the Customs Courts Act of 1980 (Public Law 96–417, 94 Stat. 1747) specified that the jurisdictional provisions of 28 U.S.C. 1581(i) "shall take effect on November 1, 1980." On December 17, 1980—subsequent to the court's issuance of the preliminary injunction in question—the Technical Amendments Act was enacted to (among other things) limit the jurisdictional grant set forth in 28 U.S.C. 1581(i) "to civil actions commenced on or after the effective date of this act," i.e., November 1, 1980. Public Law 96–542.

The complaint in this action was filed on June 27, 1980, and an amended complaint was filed on November 3, 1980. Against this background, rule 15(c) of this court provides that an amended complaint relates back to the date of the original pleading. Manifestly, were this rule to be construed as requiring the amended complaint to relate back to June 27, 1980, the complaint would have to be dismissed for lack of jurisdiction since 28 U.S.C. 1581(i) does not apply to civil actions instituted in June 1980. However, as defendant agrees, such an interpretation would be at odds with rule 1(a) of this court which provides that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." Given the fact that 28 U.S.C. 2636(i), as added by the Customs Courts Act of 1980, allows a 2-year limitation period for commencing a civil action over which this court has jurisdiction under 28 U.S.C. 1581(i), dismissal of the present action for lack of jurisdiction would merely have the effect of requiring plaintiff to refile its amended complaint in the form of a new complaint. Such a requirement not only would be inconsistent with the thrust of rule 1(a), it would exalt form over substance. In view of these circumstances, the present civil action is deemed filed on November 3, 1980, and therefore the court has jurisdiction pursuant to 28 U.S.C. 1581(i), as amended.

Decisions of the United States Court of International Trade

Abstracts

Abstracted Protest Decisions

DEPARTMENT OF THE TREASURY, *February 9, 1981.*

The following abstracts of decisions of the United States Court of International Trade at New York are published for the information and guidance of officers of the Customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to Customs officials in easily locating cases and tracing important facts.

WILLIAM T. ARCHEY
Acting Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P81/20	Boe, J. February 4, 1981	Continental Machine Tool Co.	79-4-00666	Item 534.95 70%	Item 766.25 Free of duty	Judgment on the pleadings	Los Angeles Antiques
P81/21	Boe, J. February 4, 1981	Futaba Industries USA	80-5-00871	Item 720.42 12.5%	Item 685.70 4%	U.S. v. Texas Instruments Inc. (C.A.D. 1243)	Los Angeles Numerical display tubes
P81/22	Boe, J. February 4, 1981	Sumitomo Corporation of America	79-7-01077	Item 610.80 11%	Item 660.15 7%	Agreed statement of facts	Philadelphia Parts of economizers and auxiliary plants for use with steam and other vapor generating boilers

Decisions of the United States Court of International Trade

Abstracts

Abstracted Reappraisement Decision

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R81/50	Boe, J. February 4, 1981	B. Altman & Co. et al.	274900-A, etc.	Cost of production	As indicated in schedule "B" attached to decision and judgment	Agreed statement of facts	New York Cashmere sweaters

Appeal to the United States Court of Customs and Patent Appeals

APPEAL 81–9.—S. J. Style Associates, Ltd., et al. *v.* Dennis Snyder, et al., AN ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION. Appeal From Order of January 12, 1981 (Slip Op. 81–2).

In this case, plaintiffs' filed an application for a temporary restraining order and preliminary injunction seeking to enjoin the defendants from implementing a directive referred to as pipeline No. 524, which was issued by the Regional Commissioner of New York Region on November 7, 1980. The court heard and considered the evidence presented by the parties through their respective witnesses, the arguments presented as well as memoranda submitted by counsel, and, upon conclusion of the testimony and within proceedings, the court presented orally in open court its opinion and decision concerning plaintiffs' application. In its opinion and decision, the court denied plaintiffs' motion for preliminary injunction.

In its notice of appeal, plaintiffs-appellants state their dissatisfaction with the opinion and decision of the U.S. Court of International Trade in refusing to issue an injunction in this matter and request the U.S. Court of Customs and Patent Appeals to review the questions involved therein, and to grant such relief in the premises as the court shall seem just.

It is claimed that the U.S. Court of International Trade erred in issuing an interloctory order refusing to issue an injunction in this matter; in abusing the trial court's discretion in ruling upon the merits of the action; in finding and holding that CFR subsection 141.62(a) was a delegation of authority to the Regional Commissioner of Customs at the Port of New York to prohibit the filing of entry documentation, and the authorization of merchandise released at John F. Kennedy International Airport, and Newark Seaport; in finding and holding that the action was moot because the Regional Commissioner stated that pipeline 524 would not be implemented in its present form; in finding and holding that plaintiffs failed to establish that plaintiffs would be irreparably harmed by the issuance of pipeline 524; in finding and holding that the irreparable injury to plaintiffs was out-

weighed by the public interest; in finding and holding that the court should not review or inhibit the actions of public officials where questions of integrity are involved; in finding and holding that a greater showing of irreparable injury was required here; in finding and holding that plaintiffs did not have a likelihood of success on the merits; in not finding and holding that plaintiffs would be irreparably injured; in not finding and holding that the actions of the Regional Commissioner of Customs were arbitrary and capricious; in finding and holding contrary to the weight of undisputed facts, contrary to law and the intent of Congress; in not finding and holding that pipeline 524 was rulemaking pursuant to 5 U.S.C. 553 and that Federal Register notice was required; and in not issuing findings of facts and conclusions of law in accordance with rule 52 of the rules of the U.S. Court of International Trade.

International Trade Commission Notices

Investigations by the U.S. International Trade Commission

DEPARTMENT OF THE TREASURY

The appended notices relating to investigations by the U.S. International Trade Commission are published for the information of Customs officers and others concerned.

R. E. CHASEN,
Commissioner of Customs.

In the Matter of	
CERTAIN POULTRY DISK PICKING MACHINES AND COMPONENTS THEREOF	Investigation No. 337–TA–78

Notice of Termination

AGENCY: U.S. International Trade Commission.

ACTION: Termination of investigation on the basis of settlement agreement.

SUMMARY: Having reviewed the record of the investigation, the parties' settlement agreement, and the recommendation of the presiding officer, the Commission has voted to grant motion docket No. 78–3 and has ordered the termination of investigation No. 337–TA–78, "Certain Poultry Disk Picking Machines and Components Thereof."

PETITIONS FOR RECONSIDERATION: Any party wishing to petition for reconsideration of the Commission's action must do so within 14 days after service of the Commission's order. Such petitions must be in conformity with section 210.56 of the Commission's rules of practice and procedure (19 CFR 210.56).

SUPPLEMENTAL INFORMATION: This investigation was instituted on February 27, 1980 (45 F.R. 12932), following receipt of a complaint filed on behalf of Stork-Gamco, Inc., a manufacturer and

distributor of poultry-processing apparatus. The complaint, as amended, alleged the violation of section 337(a) of the Tariff Act of 1930 with respect to the importation into the United States and the sale of certain poultry disk picking machines which are alleged to infringe claims 3, 6, and 8 of U.S. Letters Patent 3,197,809. Two parties were named as respondents: Machinefabriek Meyn, B.V., and Meyn, USA, Inc.

Prior to and concurrently with the Commission's investigation, the parties had been engaged in Federal civil litigation which involved the same subject matter and issues similar to those before the Commission. At the conclusion of a trial on the issues of patent validity and infringement, the court ruled that U.S. Letters Patent 3,197,809 was valid and that the machines manufactured and sold by respondents do not infringe claims 3, 6, and 8 of that patent. Following issuance of the court's written decision, the complainant and the respondents entered a written agreement settling all matters in controversy which were still pending before the court and before the Commission.

As a result of the settlement agreement, the complainant filed a motion (docket No. 78–3) on September 8, 1980, requesting termination of the Commission's investigation. The motion was signed by all parties, including the Commission investigative attorney. On September 12, 1980, the presiding officer issued a recommended determination that the investigation be terminated.

Pursuant to its obligations to safeguard the public interest and to seek advice and information from other Government agencies during the course of these proceedings, the Commission solicited written comments concerning the impact that the proposed termination would have upon the public interest. A notice requesting public comment was published in the Federal Register of December 17, 1980 (45 F.R. 83037), and letters were sent to the appropriate agencies and departments. No comments were received.

ADDITIONAL INFORMATION: The Commission's action and order, the settlement agreement, and all other public documents on the record of this investigation are available for public inspection during official business hours (8:45 a.m. to 5:15 p.m.) at the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., room 156, Washington, D.C. 20436; telephone 202–523–0161.

FOR FURTHER INFORMATION CONTACT: Phyllis N. Smithey, Esq., Office of the General Counsel, U.S. International Trade Commission, 701 E Street NW., room 224, Washington, D.C. 20436; telephone 202–523–0321.

By order of the Commission.

Issued: February 5, 1981.

KENNETH R. MASON,
Secretary.

(332–122)

Study of the Economic Impact on the Domestic Jewelry Industry of the Subdivision of Item 740.10 of the Tariff Schedules of the United States for Purposes of the Generalized System of Preferences

AGENCY: U.S. International Trade Commission.

ACTION: As a result of a request of February 5, 1981, from the Senate Committee on Finance to give favorable consideration to any request from domestic interests for an extension of the date for the public hearing for the subject investigation, the Commission has rescheduled the hearing for investigation No. 332–122 from February 19, 1981, to March 30, 1981. The hearing will be held in the conference room of the Biltmore Hotel, Kennedy Plaza, Providence, R.I., beginning at 10 a.m., e.s.t. All persons shall have the right to appear by counsel or in person, to present information, and to be heard. Requests to appear at the public hearing should be filed with the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, not later than noon, March 24, 1981.

FOR FURTHER INFORMATION CONTACT: Mr. Peter Bodde, General Manufacturers Division, Office of Industries, U.S. International Trade Commission, Washington, D.C. 20436; telephone 202–724–1730.

SUPPLEMENTARY INFORMATION:

REQUEST FOR EXTENSION

The Commission's initial notice of investigation No. 332–122 containing information on investigation coverage, the public hearing, and related information, was published in the Federal Register of January 22, 1981 (46 F.R. 7108). On February 5, 1981, the Commission received a Senate Finance Committee request to give favorable consideration to any request by a domestic interest for extension of the date of the public hearing for the investigation. On February 6, 1981, a letter was received from a representative of the domestic jewelry industry requesting that the hearing be postponed 3 weeks until sometime after March 9, 1981.

WRITTEN SUBMISSIONS

In lieu of or in addition to appearances at the public hearing, interested persons are invited to submit written statements concerning the investigation. Commercial or financial information which a submitter desires the Commission to treat as confidential must be submitted on separate sheets of paper, each clearly marked "Confidential Business Information" at the top. All submissions requesting

confidential treatment must conform with the requirements of section 201.6 of the Commission's rules of practice and procedure (19 CFR 201.6). All written submissions, except for confidential business information, will be made available for inspection by interested persons. To be insured of consideration by the Commission, written statements should be submitted at the earliest practicable date, but no later than April 6, 1981 (extended from the original deadline of Feb. 27, 1981). All submissions should be addressed to the Secretary at the Commission's office in Washington, D.C.

By order of the Commission.

Issued: February 11, 1981.

KENNETH R. MASON,
Secretary.

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U.S. Customs Service

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